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No. 83-671

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983

UNITED STATES OF AMERICA,

Plaintiff/Respondent,

v.

ISAAC KATTAN-KASSIN,

Defendant/Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED ON CERTIORARI

I

WHERE THE EVIDENCE RELATING TO DEFENDANT'S GUILT IS CIRCUMSTANTIAL AND CONFLICTING, DOES A VIEW OF THE SCENE BY THE JURY CONSTITUTE A "STAGE OF THE TRIAL" UNDER RULE 43(a), FEDERAL RULES OF CRIMINAL PROCEDURE, REQUIRING THE PRESENCE OF THE DEFENDANT (I.E., IS A JURY VIEWING THE TAKING OF "EVIDENCE" UNDER RULE 26)?

A. DOES THE ABSENCE (AT THE VIEWING OF ALL COURT PERSONNEL EXCEPT THE BAILIFFS CONSTITUTE DENIAL OF THE ASSISTANCE OF COUNSEL REQUIRED BY THE SIXTH AMENDMENT?

B. DOES THE ABSENCE (AT THE VIEWING) OF ALL COURT PERSONNEL EXCEPT THE BALIFFS DENY THE DEFENDANT DUE PROCESS OF LAW REQUIRED BY THE FIFTH AMENDMENT?

II

DOES THE APPELLATE COURT'S RELIANCE ON EVIDENCE TAKEN AT A PRE-TRIAL MOTION TO SUPPRESS, RATHER THAN THE EVIDENCE AT TRIAL, CONSTITUTE A FAILURE TO ACCORD PETITIONER A "FAIR APPELLATE HEARING" AND A DENIAL OF DUE PROCESS?

A. WHERE THE JURY HEARD ONLY PORTIONS OF THE PRE-TRIAL MOTION EVIDENCE INTRODUCED DURING CROSS-EXAMINATION OF THE AGENTS PURSUANT TO FEDERAL EVIDENCE RULE 801(d)(1)(A).

B. WHERE THE JURY WAS ERRONEOUSLY INSTRUCTED THAT PRIOR SWORN TESTIMONY WAS "IMPEACHMENT" RATHER THAN SUBSTANTIVE EVIDENCE.

III

DOES THE FILING OF A "SENTENCING MEMORANDUM" CONSTITUTE A PROCEDURE UNAUTHORIZED BY STATUTE AND THEREBY DEPRIVE THE DEFENDANT

OF HIS RIGHT TO ALLOCUTION UNDER FEDERAL CRIMINAL RULE 32(a): AND THUS DENY DEFENDANT DUE PROCESS OF LAW AT SENTENCE?

IV

WERE THE CONSECUTIVE SENTENCES HERE IMPOSED IN VIOLATION OF THE DOUBLE JEOPARDY CLAUSE?

(HAS THE "ABSTRACT" APPROACH TO THE DOUGLE JEOPARDY CLAUSE ENUNCIATED IN BLOCKBERGER V. UNITED STATES, (1932) 284 U.S. 299, 52 S.CT. 180, 182, BEEN MODIFIED BY THIS COURT IN WHALEN V. UNITED STATES (1980) 445 U.S. 684, 100 S.CT. 1432, AND ILLINOIS V. VITALE (1980) 445 U.S. ___, 100 S.CT. 2260?)

PARTIES TO THE ACTION

Parties to the action are Petitioner, ISAAC KATTAN-KASSIN (hereafter "KATTAN"), and the UNITED STATES OF AMERICA.

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UNITED STATES OF AMERICA,

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v.

ISAAC KATTAN-KASSIN,

Defendant/Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Defendant ISAAC KATTAN-KASSIN (hereafter "KATTAN"), petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINION BELOW

The Opinion of the Court of Appeals (App. "A", infra, pp. 1-11) is not reported. The "companion case" of United States v. Espinosa-Orlando (1983) referred to by the Court of Appeal is reported at 704 F.2d 507.

JURISDICTION

The judgment of the Court of Appeals was entered on June 3, 1983, and a Petition for Rehearing was denied on August 24, 1982 (Appendix "B", infra, pp. 1-3). The jurisdiction of this Court is invoked under 18 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth Amendment to the Constitution provides in pertinent part:

"No person shall be. . .deprived of life, liberty, or property, without Due Process of law. . ."

The Sixth Amendment to the Constitution provides in pertinent part:

"In all criminal prosecutions, the accused shall enjoy the right to. . . be confronted with the witnesses against him;. . .and to have the Assistance of Counsel for his defense."

Federal Rule of Criminal Procedure 26 provides:

"In all trials the testimony of witnesses shall be taken orally in open Court. . .".

Rule 43(a) provides in pertinent part:

"The defendant shall be present. . . at every stage of the trial. . .".

The Federal Rules of Evidence in their pertinent parts provide:

Rule 401. "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

Rule 402: "All relevant evidence is asmissible. . .".

Rule 801(d). "A statement is not hearsay if -

(1). . .the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement and the statement is

(A) inconsistent with his testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding. . ."

STATEMENT

KATTAN was charged with and found guilty of one Count of conspiracy to possess with intent to distribute cocaine (21 U.S.C. §841(a)(1) and §846), and possession with intent to distribute and aiding and abetting the possession with intent to distribute cocaine (21 U.S.C. §841(a)(1) and 18 U.S.C. §2). He was sentenced to the maximum possible sentence of 15 years on each of two Counts to run consecutively and received a maximum fine of $15,000.00 on each Count (as suggested by the Government in its Sentencing Memorandum filed with the Court and served on opposing counsel prior to the time of sentencing).

In reviewing Petitioner's contention that the evidence was insufficient to support the conviction, the Court of Appeals, instead of reviewing the evidence presented at the time of trial, instead relied on evidence presented at pre-trial

motions to suppress evidence. "The facts surrounding the arrest are set out in the companion case of United States v. Espinosa-Orlando,. . .[704 F.2d 507]. . ., and will not be repeated here except as they are pertinent to this appeal. . ." (App. "A", infra, p. 2.

During the trial, defense counsel requested a jury view of the crime scene. The defense urged that a jury view was critical to its case. After denying defendant's counsel's request that counsel accompany the jurors, the trial Judge indicated that only the jurors and the Federal Marshals were to attend the view. The Court reporter did not attend the view and there is no record indicating what transpired at the time of the view.

Prior to sentencing the government filed a Pre-Sentence Memorandum and served the same upon defense counsel. Because the Memorandum contained inadmissible material and material which the defendant could not rebut, without

violating his privilege against self-incrimination (he had another Federal trial pending), defendant moved for a new Pre-Sentence Investigation Report and asked that the sentencing be had before another Judge. These motions were denied and the defendant was given the maximum consecutive sentences recommended by the Government in its Memorandum.

REASONS FOR GRANTING CERTIORARI

I

THE COURT OF APPEALS ERRONEOUSLY CONCLUDED THAT THE JURY'S TAKING OF EVIDENCE, OUTSIDE THE PRESENCE OF THE DEFENDANT, HIS COUNSEL AND THE COURT, DID NOT DEPRIVE HIM OF A FAIR TRIAL IN VIOLATION OF THE SIXTH AMENDMENT, DUE PROCESS OF LAW, AND FEDERAL RULE OF CRIMINAL PROCEDURE 43(a).

"A leading principle that pervades the entire law of criminal procedure is that, after indictment found, nothing shall be done in the absence

of the prisoner."[1/] This rule was subsequently embodied in Rule 43 of the Federal Rules of Criminal Procedure. Rule 43(a) requires the presence of the defendant at every stage of the trial, including the empaneling of the jury and the return of the verdict, and at the imposition of sentence. Although the Court at one point said this principle "deals with the rule at common law and not with constitutional restraints,"[2/] more recently the Court said that the accused's right to be present in the Courtroom at every stage of his trial is guaranteed by the Constitution Clause of the Sixth Amendment and is binding on the States under the Fourteenth Amendment.[3/]

[1/] Lewis v. United States, 146 U.S. 370, 372, 13 S.Ct. 136, 137, 36 L.Ed. 1101 (1982).

[2/] Snyder v. Massachusetts, 291 U.S. 97, 117, n.2, 54 S.Ct. 330, 336, n.2, 78 L.Ed. 674 (1934).

[3/] Illinois v. Allen, 397 U.S. 337, 338, 90 S.Ct. 1057, 1058, 25 L.Ed.2d 353 (1970); Faretta v. California, 422 U.S. 806, 816, 95 S.Ct. 2525, 2531, 45 L.Ed.2d 562 (1975); U.S. v. Stratton, 649 F.2d 1066, 1080 (5th Cir. 1981).

The panel erroneously relied on dictum in Snyder v. Massachusetts, supra, 291 U.S. 97, overruled on other grounds; Malloy v. Hogan, 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.1d 653 (1964), that a "defendant does not enjoy a due process right of presence at a jury view as a matter of law."[4/] In Snyder, a State murder prosecution, the Court held that the refusal of the trial Judge to grant the defendant's request to be present at a view was not a denial of due process where his counsel was present at the view and there was no showing of injustice. Id., 291 U.S. at 108, 54 S.Ct. at 333. The decision was 5 to 4, with Justice Roberts, Brandeis, Sutherland, and Butler dissenting.

In commenting on the majority's reasoning in Snyder, professor Orfield states:

> "It is unrealistic to say that the purpose of a view is not to receive evidence and that it is not part of the trial. The instant case uniquely held that

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[4/] App. A., p. 3.

> while a view is evidence, it is not part of the trial. The dissenting justices rightly contended that the error is so fundamental that the defendant should not have to show prejudice." (footnote omitted).[5]

In Snyder, counsel for the parties attended the jury view as showers and a transcript was made of the proceedings at the view. In dissent, Mr. Justice Roberts stated:

> "If, then, a view of the premises where crime is alleged to have been committed is a part of the process of submission of data to the triers of fact, upon which judgment is to be founded; if the knowledge thereby gained is to play its part with oral testimony and written evidence in striking the balance between the State and the prisoner, it is a part of the trial. If this is true, the Constitution secures the accused's presence. In this conclusion, all the Courts, save those of Massachusetts, agree. Such difference of view as the authorities exhibit as to the prisoner's right to be present at a view arises out of a disagreement on the question whether the view is a part of the trial, whether it is, in effect the taking of evidence. The great weight of authority is that it forms a part of the trial, and for that reason, a defendant who so desires

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[5] 6 Orfield, Criminal Procedure Under the Federal Rules, §43:24, p. 27.

is entitled to be present."[6/]

The Court of Appeals in our case did not address the issue of whether evolving constitutional principles have eroded the basis for the majority's position in Snyder, or whether the Court in that case would have found error of constitutional dimensions if Snyder's counsel had not attended the view as in the instant case. See, e.g., United States v. Wade, 388 U.S. 218, 223-227, 87 S.Ct. 1926, 18 L.Ed.2d 1149, (1967); White v. Maryland, 373 U.S. 59, 60, 83 S.Ct. 1050, 10 L.Ed.2d 193 (1963); Washington v. Texas, 388 U.S. 14, 18, 87 S.Ct. 1920, 18 L.Ed.wd 1019 (1967); Duncan v. Louisiana, 391 U.S. 145, 149, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968); Benton v. Maryland, 395 U.S. 784, 794, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969); Pointer v. Texas, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed. 2d 923 (1965); Illinois v. Allen, supra, 97 U.S.

[6/] 291 U.S. at 134, 54 S.Ct. at 343 (footnote omitted).

at 339; Gerstein v. Pugh, 420 U.S. 103, 114, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975). The selective incorporation of the Bill of rights into the Fourteenth Amendment leaves little doubt that Justice Roberts' dissent would now be the majority position of this Court, thus meriting certiorari review by this Court.

Rule 26 of the Federal Rules of Criminal Procedure, provides in part:

> "In all trials. . .[t]he admissibility of evidence. . .shall be governed, except when an act of Congress or these Rules otherwise provide, by the principles of the common law as they may be interpreted by the Courts of the United States in the light of reason and experience."

"Venturing forth to observe places or objects which are material to litigation but which cannot feasibly be brought or satisfactorily reproduced within the Courtroom is termed a 'view.'" McCormick's Handbook of the Law of Evidence, 2d Ed., (1972) §216, p. 537.

Furthermore, it now apparently appears that the weight of modern authority supports the position that a "view" constitutes the taking of evidence. 4 J. Wigmore, Evidence, §§ 1150-1151, 1163-1169 (3d Ed. 1940); C. McCormick, Evidence, §183 (1954); Morgan, Basic Problems of Evidence, p. 167-168 (1954); 14 Bos.U.L.Rev. 402, 406 (1934); 12 Har.L.Rev. 211 (1898); 22 Wright and Graham, Federal Practice and Procedure, §5176 at 141.

> "The taking of a view is part of the process of submission of data to the triers of fact. Knowledge gained thus by the jury must of necessity be weighed and balanced with knowledge gained from the testimony of witnesses. There is a want of consistency to say that the Constitution guarantees the right of a defendant to be present when evidence of one kind is offered against him and then in the next breath to say that he has no such right when another type of evidence is being introduced. It is all evidence. The jury makes no distinction when they are considering the evidence in the case. The verdict might rightfully hinge on what 'was seen' at the view." 14 Bos.U.L.Rev. 402, 406.

Thus, this case squarely presents the issue of whether the jury's taking of evidence outside of the presence of the defendant his counsel, the Court and the Court Reporter, denies defendant's Sixth and Fifth Amendment rights and his statutory right to be present at trial under Rule 43(a). The panel decision chose to ignore this issue by its reliance on Snyder and the fact that the jury was not allowed to ask questions, terming the view a "bare inspection."[7/] To term the view a "bare inspection" begs the constitutional questions presented by the instant case. In Snyder, the jurors, accompanied by baliffs, the Judge, the Court stenographer, the District Attorney and counsel for the defendant, went to view the scene of the crime. Snyder, supra, 291 U.S. at 103. In the instant case, the Court denied defendant's counsel's request to accompany the jurors on the view, and directed that no Court personnel would be present,

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[7/] App. A, p. 4.

except for the marshals, to insure that no one spoke to the jury during the view.[8/] Incredibly, the Judge in the instant case, directed the jurors to go on their own, to break up into groups of three or four, and indicated that if a juror didn't want to go, or if they didn't feel up to it, they didn't have to go.

8/"There wouldn't be any lawyers along, wouldn't be any court personnel except U.S. marshals, and there total function would be to see that no one speaks to the jury and the jury does not speak to anyone.

"We'll show them on the diagram the area and say, 'there it is, and if you want to see it, you can. If you don't want to, you don't have to.'

"I mean the only thing we'll request them to do is to walk to the sidewalk and walk along and look out into the busy street, the Biscayne Blvd. . . .

"Now, is that satisfactory? I don't see any problem with it.

"Mr. Josefsberg: I don't see any problem with the two attorneys being there and seeing them do this, so long as we don't talk with anyone. I would like to see what they see. I would like to watch them.

"The Court: Well, then they might feel under some compulsion to go and do something or not do something. I would rather not put any pressure onthe jury." (Tr. 5/4/81, pp. 192-193.)

"The Court: . . .I'm talking to the marshals now. You see, on the public streets, the television cameras have a right to do what they want to do. They don't have the right to, you know, impede the progress of somebody, but I don't want any big confrontation out there.

"Just ignore them and let them do what they want to do, if anything; just sort of outsmart them, what we might do is break you up in groups of four and let four of you go with each marshal and some go down Third Street, some down Second.

"You know, we developed procedures to handle these things; but, now, if any of you would prefer not to go, you don't have to go.

"The lawyers and I think this will be helpful to you; but if it is too long a walk for anybody or if you don't feel well or don't feel up to it or something of the sort, that's fine. You don't have to go.

"If you get over there you are on your own, you look at whatever you want to look at and then come back, and when you all get back here we'll resume the trial.

"The marshal: * If * they're * broken up into the groups, can the group of three or four come back when they are done?

"The Court: You can come back when you are done. You don't have to go together. Why don't you just break up in groups of three or four, four apiece, and, you know, when you are ready to come back, come on back." (Tr., 5/6/81, pp. 211-213.)

The Judge's instructions to the jury with respect to the "view," was done in the absence of the defendant and his counsel, having taken place in the jury room. (Tr., 5/6/81, pp. 209-214). Therefore, not only was this defendant denied his right to be present and his right to assistance of counsel during the taking of evidence by the jury, the absence of a Court Reporter during the view denied the defendant a record of what transpired during the view, or if all the jurors were present. Since the Judge's instructions were made outside of the presence of the defendant and his counsel, failure to object was not an "intentional relinquishment or abandonment of a known right or privilege." Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023 (1938).

Defendant submits that the taking of evidence on essential elements, in the absence of the defendant in a criminal prosecution, is a direct violation of the defendant's right under

the United States Constitution's Due Process Clause of the Fifth Amendment. See, Price v. Johnson, 334 U.S. 266, 68 S.Ct. 1049. At a minimum, defendant's absence frustrated the fairness of the proceedings. (Faretta v. California, supra, 422 U.S. 806 at 819, n.15; United States v. Stratton, supra, 649 F.2d at 1080; United States v. Brown, 571 F.2d 980 (6th Cir. 1978)) in addition to violating Rule 43(a)'s guarantee of a defendant's right to be present at every stage of trial. See, Rogers v. United States, 422 U.S. 35, 95 S.Ct. 2051, 45 L.Ed.2d 1 (1975); United States v. Stratton, supra; United States v. Benavides, 549 F.2d 392 (5th Cir. 1977).

Secondly, the Court's refusal to permit defendant's counsel to attend the view by the jury denied defendant effective assistance of counsel at a critical stage in the proceedings. Johnson v. Zerbst, supra, 304 U.S. 467-468; United States v. Wade, supra, 388 U.S. 223-227; White v. Maryland, supra, 373 U.S. at 60.

As the Court of Appeals in United States v. Walls, 443 F.2d at 1223, held:

> "Some Courts have characterized information derived from a view of the scene as evidence. Others have treated a view merely as a procedure whereby the fact-finder is enabled to better understand the evidence adduced at trial. This division of authority persists despite the statements of eminent scholars that a view constitutes the taking of evidence. [citations] However, it can at least be stated that, however a view is characterized, 'its inevitable effect is that of evidence. * * *' Snyder v. Massachusetts, 291 U.S. 97, 121, 54 S.Ct. 330, 78 L.Ed. 674 (1934). Accordingly it was reversible error for the Court to deny appellant and his attorney the opportunity to attend the view to insure against the intrusion of prejudicial error." (footnote omitted).

Third, based on the Judge's instructions to the jury with respect to the view, and the absence of the Court Reporter during the view, actual prejudice must be presumed. United States v. Gay, 522 F.2d 429, 435 (6th Cir. 1975); State v. Garden, 125 N.W.2d 591, 600 (Minn. 1967), (". . .To argue that because the record is silent as to what was said, therefore no

prejudice appears, is to beg the constitutional question. The substance of defendant's right is to know what transpired during the viewing"). Here, the record[9/] is not only silent as to what transpired while the jury separated to take the view, it is also silent as to whether all the jurors in fact chose to go with the marshals on the view. In light of the fact that the view was critical to the defense,[10/] that neither the defendant nor his counsel were present, lack of a record resulted in actual prejudice to this defendant.

In sum, as Justice Roberts in his dissent in Snyder states:

> "It has been urged that the prisoner's privilege of presence is for no other purpose than to safeguard his opportunity

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[9/] Although the Court suggested that his instructions to the jury in the jury room with respect to the view be read back to counsel after he gave them, the record does not reflect that his instructions were read to the defendant or his counsel (Tr. 6/15/81, p. 202-203).

[10/] (Tr. 5/5/81, pp. 185, 187.)

to cross-examine the adverse witnesses. But the privilege goes deeper than the mere opportunity to cross-examine, and secures his right to be present at every stage of the trial. The cases. . . sufficiently illustrate and amply sustain the proposition that the right is fundamental and assures him who stands in jeopardy that he may in person, see, hear, and know all that is placed before the tribunal having power by its finding to deprive him of liberty or life.

* * *

"The accused cannot cross-examine his own witnesses. Will it be suggested that, for this reason, he may be excluded from the Courtroom while they give their evidence? He cannot cross-examine documents or physical exhibits. The documents, plans,maps, photographs, the clothing worn by the victim and by the perpetrator of the alleged crime, the weapon used, and other material objects may be more potent than word of mouth to carry conviction to the jury's minds; and so of the physical appearance of the scene of the crime. No reason is apparent why, if the accused may be excluded from a view, he may not also be excluded from the Courtroom while such documentary and physical evidence is proffered to and examined by the jury. The opportunity for cross-examination of witnesses is only one of many reasons for the defendant's presence throughout the trial." 291 U.S. at 131-132.

II

THE COURT OF APPEALS' REVIEW OF FACTS ADDUCED AT A HEARING OTHER THAN THE TRIAL OF THE PETITIONER DENIED PETITIONER A FAIR APPELLATE REVIEW AND MANDATES A SUMMARY GRANT OF CERTIORARI AND REMAND TO THE COURT OF APPEALS FOR FURTHER CONSIDERATION.

The Opinion of the Court of Appeals begins with the statement, "The facts surrounding the arrest are set out in the companion case of United States v. Espinosa-Orlando, [704 F.2d 507], and will not be repeated here except as they are pertinent to this appeal." (App. "A", p. 2). KATTAN was convicted after a jury trial. Espinosa was convicted (in a different, subsequent trial) in a non-jury trial based on stipulated facts adduced at the hearing on the joint KATTAN/ESPINOSA pre-trial motions to suppress evidence.

After the KATTAN/ESPINOSA pre-trial motions to suppress were denied, Espinosa jumped bail

and on May 4, 1981, a jury trial commenced as to KATTAN only. The trial of KATTAN involved complex and often contradictory testimonial evidence of Government agents concerning the facts leading up to KATTAN's arrest. This testimony before the jury was supplemented and contradicted by the agents' prior sworn testimony at the suppression motions and by their Affidavits filed with the Court. KATTAN's defense was based on the fact that the agents contradicted each other and themselves on critical issues relating to KATTAN's participation in the transfer of the narcotics, and it was on this very basis that the defense counsel informed the Court that a view by the jury was "critical" so that they could better understand the diagram of the scene drawn by agent Wilson, and evaluate the credibility of the agents who testified as to what they saw or did not see.

Instead of reviewing the testimony and evidence produced at the KATTAN trial, the Court

of Appeals adopted the Espinosa "facts" as the facts in Appellant's case. By so doing, the Court of Appeals accorded the Appellant KATTAN no meaningful review, and at the same time glossed over the critical importance of the jury view of the crime scene. It was KATTAN's position on appeal that since the new Federal Rules of Evidence provided that the prior sworn testimony had equal validity as "substantive" evidence with the testimony of the agents before the jury, that no reasonable jury could have convicted KATTAN had they been properly instructed (nor could the conviction of KATTAN be sustained under the mandate of In re Winship, 397 U.S. 358, 90 S.Ct. 1068, that Due Process requires a criminal conviction on proof beyond a reasonable doubt).

The Court of Appeals in KATTAN's case recited certain "facts" which they took from Espinosa's trial record:

> "The Citation's driver removed a large red suitcase from his trunk. Espinosa carried the suitcase with some difficulty across the median and placed it in his Jaguar, DEA agents noticing that the rear lowered noticeably as he did so. KATTAN and Espinosa shook hands and Espinosa departed, waving as he drove away. KATTAN and the Citation's driver returned the wave." 704 F.2d at 510.

In KATTAN's appeal, the Court of Appeals found the following (App. A, pp. 5-6):

> "The evidence showed that Appellant conversed with one Espinosa, made two phone calls from two different pay phones, led the above-mentioned party to the scene of a transfer of a suitcase containing 20 kilograms of cocaine from a third car to Espinosa's car, supervised the transfer, and shook hands with Espinosa, who waved as he drove away with the suitcase."

The testimony at KATTAN's trial was completely different. Here are a few examples.

Agent Wilson testified that the suitcase was carried by John Doe to the median planting between the white Citation and the Jaguar, where Espinosa took possession of the suitcase.[11/]

[11/] "The John Doe took out of his vehicle a large, what appeared to me to be a large heavy -- he (cont.)

Agent Villar, on the other hand, testified at trial that John Doe brought the suitcase all the way over to where the Jaguar was located (Tr. 5/5/81, p. 175). With respect to KATTAN and Espinosa shaking hands, Agent Wilson did not see any handshake take place (Tr. 5/4/81, pp. 43-44). Agent Villar, who had a clear view of the transfer, did not observe KATTAN and Espinosa shaking hands. (Tr. 5/4/81, pp. 152-153; 178). Only agent Bunnell, Agent Villar's partner, testified that he saw the alleged handshaking (Tr. 5/6/81, p. 222).

11/ (cont.)

was having difficult handling it -- a large red suitcase out of the trunk of his car.

"He walked it across the planted area, the raised portion between the parking lanes. He set it down in the street on the west side of that raised area.

"Mr. Espinosa picked it up, requiring two hands to pick it up. He walked it over to the trunk of his vehicle, placed it in the trunk of that vehicle, and closed the lid." (Tr. 5/4/81, pp. 42-43).

This Court has held that Due Process requires a criminal conviction on proof beyond a reasonable doubt (In re Winship, supra, 397 U.S. 358), and further that review on a claim of insufficiency of the evidence is to be based on trial transcripts. See Jackson v. Virginia, (1979) 443 U.S. 307, 99 S.Ct. 2781. The fact that the Court of Appeals in our case passed on the sufficiency of the evidence by relating to the transcripts of the trial of another person establishes, a fortiori, that Petitioner was denied constitutionally mandated appellate review and merits a grant of Certiorari and summary remand by this Court to the Court of Appeals for further consideration of Petitioner's appeal to that Court, based on the transcripts of the trial in his case.

III

THE FILING OF THE GOVERNMENT'S SENTENCING MEMORANDUM CONTAINING EVIDENCE INADMISSIBLE AT TRIAL, DEPRIVED APPELLANT OF HIS PRIVILEGE AGAINST SELF-INCRIMINATION, HIS RIGHT TO ALLOCUTION, AND DUE PROCESS, IN VIOLATION OF THE FIFTH AMENDMENT AND RULE 32 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE.

Following the filing of the Government's Pre-Sentence Memorandum, the District Court granted Appellant's Motion to Strike portions of the Memorandum dealing with a related charge, for which Appellant had not yet been tried.[12/] Motions for a new Pre-Sentence investigation and for transfer to another Judge were denied.

Rule 32(a) gives defense counsel an opportunity to speak on behalf of the defendant and gives the defendant the right. . ." if he wishes to make a statement in his own behalf and to present any information in mitigation of punishment."

[12/] App. "A", p. 7.

(The right of "allocution"). This Rule also gives the attorney for the Government ". . . an equivalent opportunity to speak to the Court."

Statutory authority for presentation by the Attorney for the Government under specified conditions is found in 15 U.S.C. ## 3575 et seq.; see United States v. Bowdach, 561 F.2d 1160, 1171 (5th Cir. 1977). In the instant case there is no statutory authority for the procedure used by the trial Judge to permit the prosecution and the defense to call and allow to be cross-examined witnesses, and turn the right of allocution into an adversary proceeding.

The Fifth Circuit has held, however, that while the sentencing Judge may consider evidence which may not be admissible at trial, "'rudamentary notions of fairness' must be observed at the sentencing process. The requirements of Due Process and fundamental fairness require that the defendant be given an opportunity to rebut the factual assumptions relied on by the

Judge." (citations omitted). United States v. Gonzalez, 661 F.2d 488 (5th Cir. Unit B 1981).

Therefore, if sentencing is to be turned into a mini-trial with the introduction of additional evidence, inadmissible at trial, fundamental fairness requires this Court specifically to spell out that the defendant enjoys the right of notice, confrontation and compulsory process under Rule 32. Accordingly, Petitioner submits that this merits Certiorari consideration.

IV

WHERE, AS HERE, THE EVIDENCE SUPPORTING THE CONVICTION ON BOTH THE CONSPIRACY AND SUBSTANTIVE COUNTS WAS IDENTICAL, AND THE BASIS FOR THE CONVICTION ON THE SUBSTANTIVE COUNT WAS BASED UPON AN AIDING AND ABETTING THEORY UNDER 18 U.S.C. §2, THE TEST ENUNCIATED IN BLOCKBERGER, (1932) 284 U.S. 299, 52 S.CT. 180, 182, SHOULD BE RE-EXAMINED IN THE LIGHT OF WHALEN V. UNITED STATES, (1980) 445 U.S. 684, 100 S.CT. 1432, AND ILLINOIS V. VITALE, (1980) 445 U.S. ___, 100 S.CT. 2260, AND THE ABSTRACT APPROACH APPLIED IN BLOCKBERGER MODIFIED SO THAT THE REVIEWING COURT SHOULD EXAMINE THE LEGAL THEORY AND PROOF IN EACH CASE WHERE DOUBLE JEOPARDY IS IN ISSUE.

The Sixth Circuit, in United States v. Austin, (1976) 529 F.2d 559, and in Pandelli v. United States, (1980) 635 F.2d 533, has in each case distinguished the Blockberger test in circumstances such as this, and further the Pandelli Court condemned the use of the aiding/abetting statute to prove the substantive offenses, when the defendant himself did not commit the substantive crime.

Where, as here, the evidence supporting the "conspiracy" conviction is the same evidence as that used to support the "aiding and abetting" conviction and where, as here, the Petitioner was never in possession of the contraband, consecutive sentences of 15 years based on legal fictions seem to offend constitutional guarantees and merit review by this Court on Certiorari.

CONCLUSION

Because the Court of Appeals affirmed the conviction of Petitioner based upon the record of another defendant's trial, it is suggested that this Court summarily grant Certiorari with instructions to the Court of Appeals for the Eleventh Circuit to re-review Petitioner's appeal in light of the record of his trial. On the other hand, the constitutional issues raised by this Petition vis a vis the denial of right to counsel and Due Process in permitting a jury

viewing without any procedural safeguards, or the presence of the defendant or his counsel, merit a grant of Certiorari and a full briefing on all of the issues herein presented.

Respectfully submitted,

BURTON MARKS

A Professional Corporation
Attorney for Defendant/
Petitioner
ISAAC KATTAN-KASSIN

APPENDIX "A"

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 81-5474

UNITED STATES OF AMERICA,

PLAINTIFF-Appellee,

versus

ISAAC KATTAN-KASSIN,

Defendant-Appellant.

APPEALS FROM THE UNITED STATES
DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA

(June 3, 1983)

Before FAY and CLARK, Circuit Judges, and MARKEY*, Chief Judge.

PER CURIAM:

* Honorable Howard T. Markey, Chief Judge for the Federal Circuit, sitting by designation.

Appellant Isaac Kattan-Kassin was observed, arrested, ultimately convicted on narcotic charges,[1] and sentenced to thirty years imprisonment.[2] The facts surrounding the arrest are set out in the companion case of United States v. Espinosa-Orlando, No. 81-6207 (11th Cir. May 2, 1983), and will not be repeated here except as they are pertinent to this appeal.

During the trial, defense counsel requested a jury viewing of the crime scene. The procedure

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[1]Kattan was found guilty of conspiracy to possess with intent to distribute cocaine (21 U.S.C. sections 841(A)(1) and 846 (1981)) and possession with intent to distribute and aiding and abetting the possession with intent to distribute cocaine (21 U.S.C. sec. 841(A)(1) (1981) and 18 U.S.C. sec. 2 (1969)).

[2]Kattan was sentenced to fifteen years on each of two counts, the time to run consecutively. He received a fine of $15,000 on each count and a term of three years special probation. Record Vol. 16, p. 73. Kattan was also indicted on money laundering charges. He pled guilty to one count of that indictment and received a five-year prison term to run concurrently with the thirty years. See United States v. Kattan-Kassin, 696 F.2d 893 (11th Cir. 1983).

utilized was suggested by the defense. The defense urged that a jury view was critical to its case. Pursuant to appellant's request, the judge delineated the logistics to be employed--only the jurors and federal marshals were to attend the view. The court then gave a cautionary instruction to the jury. Both parties agreed to the procedure. Defense counsel made no objection. The jury view consisted of a silent inspection where no questions were asked and no statements were made.

Represented by new counsel on appeal, appellant contends that the above-described jury view depirved him of a fair trial in violation of the sixth amendment, due process of law, and Federal Rule of Criminal Procedure 43(a). Appellant urges that we overturn his conviction. We find no reversible error.

A defendant does not enjoy a due process right of presence at a jury view as a matter of law. Snyder v. Massachusetts, 291 U.S. 97,

54 S.Ct. 330, ___ L.Ed. ___ (1934). The constitutional right to presence at every stage of one's trial is determined by whether such presence bears a reasonably substantial relationship to a defendant's opportunity to defend. Id. In Snyder, the Supreme Court stated that:

> [A] view where nothing is said by any one to direct the attention of the jury to one feature or another . . . does not assure to a defendant the privilege to be present at such a time. There is nothing he could do if he were ther, and almost nothing he could gain. The only shred of advantage would be to make certain that the jury had been brought to the right place and had viewed the right scene. If he felt any doubt about this, he could examine the bailiffs at the trial and learn what they had looked at.

Id. 291 U.S. at 108, 54 S.Ct. at 333, ___ L.Ed. at ___.

In the instant case, the jury was not allowed to ask questions. The view transpired in silence. We refuse to extend a right of presence to circumstances where, as here, a "bare inspection" is conducted and the defendant has shown

no harm resulting therefrom. Id. Moreover, we find that even assuming a right of presence in this case, defendant waived any right to attend the view by requesting the view, suggesting the procedure to be used, acquiescing in the procedure, and failing to object.

Aside from a constitutional right to presence, defendant asserts the statutory right of Federal Rule of Criminal Procedure 43(a).[3] Rule 43(a) does not necessitate a reversal in this case. That rule does not give defendant a right to attend the bare inspection depicted above. Again, even assuming a right of presence, courts have stated that Rule 43 is to be considered in

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[3]Rule 43(a) provides:

> (a) Presence Required. The defendant shall be present at the arrignment, at the time of the plea, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by this rule.

Fed.R.Crim.P. 43(a).

conjunction with the harmless error doctrine of Rule 52(a). E.g., Unitsed States v. Gradsky, 434 F.2d 880 (5th Cir. 1970), cert. denied, 409 U.S. 894, 93 S.Ct. 203, 34 L.Ed.2d 151 (1972). The inquiry is whether there exists any reasonable possibility of prejudice from defendant's absence. e.g., Estes v. United States, 335 F.2d 609, 618 (5th Cir. 1964), cert. denied, 379 U.S. 964, 85 S.Ct. 656, 13 L.Ed.2d 559 (1965). Absent prejudice, no reversal is required. Finding no prejudice to defendant in this case, we hold that any possible error was harmless.

Kattan also urges this court to overturn his conviction on grounds of insufficiency of the evidence. Viewed in the light most favorable to the government, Glasser v. United States, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942), we find the evidence sufficient to allow a reasonable trier of fact to find guilt beyond a reasonable doubt. United States v. Bell, 678 F.2d 547 (5th Cir. Unit B 1982) (en banc). The evidence showed

that appellant conversed with one Espinosa, made two phone calls from two different pay phones, led the above-mentioned party to the scene of a transfer of a suitcase containing 20 kilograms of cocaine from a third car to Espinosa's car, supervised the transfer, and shook hands with Espinosa who waived as he drove away with the suitcase.[4]

Appellant's final assertion of error going to his conviction concerns his rights under the double jeopardy clause of the fifth amendment. Appellant argues that the same evidence was used to prove both the conspiracy charge and

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[4]Appellant also asserts that the trial court erred in denying his motion for judgment of acquittal on the grounds that because the court did not attend the view and thus failed to hear all the evidence, the court could not make a finding of sufficiency of the evidence. The judgment of acquittal was properly denied where, as here, reasonable men could find the evidence adequate and sufficient to support a conclusion of defendant's guilt beyond a reasonable doubt. See, e.g., United States v. Prout, 526 F.2d 380 (5th Cir.), cert. denied, 429 U.S. 840, 97 S.Ct. 114, 50 L.Ed.2d 109 (1976).

the aiding and abetting charge. Thus, he contends that only one offense has been shown. Appellant urges that we adopt the Sixth Circuit rule and hold that under the circumstances the consecutive sentences herein imposed violate the double jeopardy clause. The precedent of this circuit is otherwise. United States v. Pearson, 655 F.2d 569 (5th Cir. Unit B 1981), aff'd on rehearing, 667 F.2d 12 (1982). Regardless that the same evidence was used to prove both charges, Kattan's fifth amendment rights have not been infringed.

Affirming appellant's conviction, we turn to his allegation of error goind to his sentencing. Prior to sentencing, the government filed a pre-sentence memorandum which contained evidence inadmissible at trial. The court granted appellant's motion to strike portions of the memorandum dealing with a related charge for

which Kattan had not yet been tried.[5] Motions for a new pre-sentence investigation and for a transfer to another judge were denied. A sentencing hearing was held at which both parties were allowed to call and cross-examine witnesses. The court allowed appellant to give an unsworn statement at the hearing which was not subject to cross-examination. Record Vol. 16, pp. 68-69. In passing sentence, the trial judge stated that he was not considering the memorandum. Record Vol. 16, p. 69-70. On appeal, Kattan requests that the memorandum be stricken and the matter be submitted for a new pre-sentence report by a different probatin officer and for sentencing before a different judge.

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[5]Originally, the memorandum included hearsay material and matters involved in Kattan's upcoming trial on laundering charges. In his interview with the probation officer, Kattan had invoked his privilege against self-incrimination as to matters concerning the laundering allegations.

A trial court has broad discretion as to the sentencing procedure employed. United Stes v. Gonzalez, 661 F.2d 488 (5th Cir. Unit B 1981). Absent gross abuse, an appellate court will not disturb that procedure. Id. In United States v. Bowdach, 561 F.2d 1160 (5th Cir. 1977), this court rejected a contention that consideration by the sentencing judge of defendant's prior convictions violated the double jeopardy clause. In reaching its conclusion, the court stated, "At a sentencing, a Court can consider many matters that might not be admissible at a trial including evidence of crimes for which the defendant has been indicted but not convicted, and evidence of other crimes." Id. at 1175.

We find no abuse of discretion by the trial court in the sentencing of Kattan and no violation of appellant's rights. Kattan was given an opportunity to rebut the factual assumptions relied on by the judge. See United States v. Gonzalez. The judge emphasized that he did not

consider the report. The sentence invoked was within the bounds of the court's discretion. We find no error in appellant's sentencing or conviction. Accordingly, we

AFFIRM.

APPENDIX "B"

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 81-5474

U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
FILED

AUG 24 1983

Spencer D. Mercer
Clerk

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ISAAC KATTAN-KASSIN,

Defendant-Appellant.

- - - - - - - - - - - - -

Appeal from the United States District Court
for the Southern District of Florida

- - - - - - - - - - - - -

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion June 3, 11 Cir., 1983, ___F.2d___).

(August 24, 1983)

Before FAY and CLARK, Circuit Judges, and MARKEY*, Chief Judge.

PER CURIAM:

(x) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Elecenth Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is also DENIED.

*Honorable Howard T. Markey, Chief Judge for the Federal Circuit, sitting by designation.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ Thomas A. Clark
United States Circuit Judge

Office - Supreme Court, U.S.
FILED
FEB 3 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-671

In the Supreme Court of the United States

OCTOBER TERM, 1983

ISAAC KATTAN-KASSIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner was denied a fair trial by a jury viewing of the crime scene, conducted at petitioner's request, at which neither petitioner, the judge, counsel, nor the court reporter was present.

2. Whether the imposition of consecutive sentences for possession of cocaine with intent to distribute it and for conspiracy to commit that offense violate the Double Jeopardy Clause.

3. Whether the pre-sentence memorandum filed by the government deprived petitioner of a fair sentencing hearing.

4. Whether the court of appeals relied upon facts adduced at the separate trial of petitioner's co-defendant in rejecting petitioner's claim that the evidence at his own trial was insufficient.

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In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-671

ISAAC KATTAN-KASSIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A11) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 3, 1983. A petition for rehearing was denied on August 24, 1983 (Pet. App. B1-B3). The petition for a writ of certiorari was filed on October 21, 1983. The jurisdiction of the Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted of possession of 20 kilograms of cocaine with intent to distribute, in violation of 21 U.S.C. 841(a) and 18 U.S.C. 2, and of conspiracy to commit that offense, in violation of 21 U.S.C. 846. He was sentenced to consecutive terms of 15

years' imprisonment, a fine of $15,000 on each count, and three years' special parole.[1] The court of appeals affirmed (Pet. App. A1-A11).

1. The evidence at trial showed that on February 26, 1981, petitioner, while under surveillance by agents of the Drug Enforcement Administration (DEA), met with co-defendant Hector Espinosa-Orlando[2] at a condominium complex located at 1915 Brickell Avenue in Miami, Florida (Tr. 27).[3] When petitioner and Espinosa left the building, they talked for several minutes in the middle of the parking lot (Tr. 28). Petitioner then entered his vehicle and drove north on Brickell Avenue (Tr. 31). Petitioner made a U-turn, placed a call from a pay phone, and proceeded south on Brickell (Tr. 145, 146, 218). Petitioner then made another U-turn and travelled north to approximately the 800-1000 block of Brickell, made a second call from a pay phone, and returned to the 1915 Brickell complex (Tr. 32, 146, 218). Petitioner slowed his vehicle almost to a stop and

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[1]Petitioner pleaded guilty to money laundering charges in another case and was sentenced to a five-year term of imprisonment concurrent with his sentence in the instant case (Pet. App. A2 n.2). See *United States* v. *Kattan-Kassin*, 696 F.2d 893 (11th Cir. 1983).

[2]Petitioner and Espinosa had been the objects of DEA surveillance commencing in January 1981 because it was believed they were laundering narcotics proceeds. Both were arrested and indicted for the offenses involved in this case. On the date set for their joint trial Espinosa jumped bail, and petitioner was tried alone. Subsequently, Espinosa was apprehended and convicted on narcotics and bail jumping charges (18 U.S.C. 3150). Espinosa was sentenced to 13 years' imprisonment and a $5,000 fine (Pet. App. A2). See *United States* v. *Espinosa-Orlando*, 704 F.2d 507, 508-509 (11th Cir. 1983).

[3]Petitioner had been at the 1915 Brickell condominium at least once before, on February 5, 1981, when he gave the alias "Julio" to the security guard and asked to be admitted to apartment 1113 (Tr. 275). A passkey to apartment 1113 was found on Espinosa when he was searched after his arrest in this case (Tr. 273).

pulled in front of Espinosa, who was parked alongside the access road to 1901 Brickell in a white Jaguar (Tr. 32). Petitioner then led Espinosa to the 300-400 block of Biscayne Boulevard where 20 kilograms of cocaine were to be transferred to Espinosa (Tr. 33-43, 148-152, 221-222).[4]

Petitioner parked his car on Biscayne Boulevard in front of a hotel while Espinosa parked inside a parking island on Biscayne (Tr. 34, 148-149, 221). Espinosa walked over to petitioner and talked with him for about five minutes (Tr. 148-149, 221). Both Espinosa and petitioner looked north and south on Biscayne while they talked (Tr. 149). Espinosa then crossed Biscayne and returned to his car (Tr. 150, 221). At that time, a white Citation pulled inside the parking island (Tr. 150). Petitioner crossed Biscayne and stood near the Citation (Tr. 150, 221). Espinosa drove his vehicle close to the place where petitioner was standing (Tr. 150-151, 221). After petitioner spoke briefly to the driver of the Citation, a suitcase containing 20 kilograms of cocaine was transferred from the Citation to the trunk of Espinosa's Jaguar (Tr. 42, 151, 222). During this time, petitioner turned to look around several times (Tr. 222). After the transfer, Espinosa shook hands with petitioner and waved to him while driving away (Tr. 43, 152, 222).

DEA agents stopped Espinosa's Jaguar and recovered the suitcase containing the 20 kilograms of cocaine (Tr. 225). When petitioner was stopped and arrested shortly thereafter, he had Espinosa's unpublished phone number in his possession (Tr. 265-266, 271-272).

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[4]In driving to the scene of the exchange, petitioner led the way; Espinosa followed and changed lanes whenever petitioner did so (Tr. 33, 148). For example, when petitioner made an illegal left turn against traffic, turning west off of Biscayne Boulevard onto Northeast 4th Street, Espinosa did the same (Tr. 33-34).

ARGUMENT

1. There is no merit to petitioner's contention (Pet. 7-22) that he was denied a fair trial because the jury viewed the crime scene outside his presence and outside the presence of the trial judge, counsel, and a court reporter. The pertinent facts were described by the court of appeals as follows (Pet. App. A2-A3).

> During the trial, defense counsel requested a jury viewing of the crime scene. The procedure utilized was suggested by the defense. The defense urged that a jury view was critical to its case. Pursuant to [petitioner's] request, the judge delineated the logistics to be employed — only the jurors and federal marshals were to attend the view. The court then gave a cautionary instruction to the jury. Both parties agreed to the procedure. Defense counsel made no objection. The jury view consisted of a silent inspection where no questions were asked and no statements were made.

At the outset, as the court of appeals held (Pet. App. A5), petitioner waived his right to object to the jury view since he had requested the view, suggested the procedure to be used, and agreed to the format that was adopted.[5] See *Valdez* v. *United States*, 244 U.S. 432, 445 (1917) (defendant waived his right to be present at a jury viewing by failing to request that he be allowed to attend). Accordingly, there is no occasion to review further petitioner's claim of error. In any event, the view conducted in this case did not deny petitioner a fair trial.

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[5]As petitioner notes (Pet. 15-16 n.8), during a colloquy with the trial court regarding the procedure to be followed during the jury view, defense counsel stated that he did not "see any problem" with counsel's being there to "watch" the jurors and "to see what they see." Counsel did not, however, affirmatively espouse that position, but instead agreed that the view be conducted outside counsel's presence (Pet. App. A3; Tr. 192, 194, 202-203).

This Court has said that "the presence of a defendant [at a jury viewing] is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only." *Snyder* v. *Massachusetts*, 291 U.S. 97, 107-108 (1934). See also *Faretta* v. *California*, 422 U.S. 806, 816 (1975) (right of accused "to be present at all stages of the proceedings where fundamental fairness might be thwarted by his absence"). *Snyder* explained that the defendant has a right to be present at the jury viewing only if "his presence has a relation, reasonably substantial, to the fulness of his opportunity to defend against the charge. * * * [The Due Process Clause does not] assure[] the privilege of presence when presence would be useless, or the benefit but a shadow" (291 U.S. at 105-107). And where, as in the instant case, there is "a bare inspection and nothing more, a view where nothing is said by any one to direct the attention of the jury to one feature or another," due process "does not assure to a defendant the privilege to be present" (291 U.S. at 108). In light of the limited jury viewing that was conducted in this case — a " 'bare inspection' " that "transpired in silence" (Pet. App. A4) — the court of appeals correctly concluded that petitioner's rights were not violated by his absence from the scene.

Nor, even apart from waiver, were petitioner's rights violated by the absence of the trial judge, counsel, or the court reporter at the jury viewing. As this Court noted in *Snyder*, 291 U.S. at 113-114, "the judge is not required to be present at a view, though he may go there if he will." With respect to counsel, in light of the manner in which the jury viewing was conducted, there is no reason to conclude —and petitioner makes no showing — that counsel's absence impaired a "meaningful 'defence' " (*United States* v. *Wade*, 388 U.S. 218, 225 (1967)); indeed, counsel was undoubtedly familiar with the site, and most of the cross-examination of the government's witnesses had occurred

before the viewing took place. Petitioner's claim (Pet. 20) that the absence of counsel and a court reporter at the jury viewing denied him the opportunity "to know what transpired" is insubstantial. As the court of appeals noted (Pet. App. A3), "[t]he jury view consisted of a silent inspection where no questions were asked and no statements were made," and petitioner does not assert anything to the contrary. "If [petitioner had] felt any doubt about [the conduct of the view], he could [have] examine[d] the bailiffs at the trial." *Snyder*, 291 U.S. at 108.

Finally, as the court of appeals held (Pet. App. A6), there is no reason to conclude that petitioner suffered prejudice as a result of the jury view, and any error in the conduct of the viewing would be harmless. See *Estes* v. *United States*, 335 F.2d 609, 618 (5th Cir. 1964), cert. denied, 379 U.S. 964 (1965).[6]

2. Petitioner contends (Pet. 31-32) that the Double Jeopardy Clause bars the imposition of consecutive sentences on the conspiracy count under 21 U.S.C. 846 and on the substantive count of possession with intent to distribute under 21 U.S.C. 841(a)(1) and 18 U.S.C. 2. His argument that he received multiple punishments for the same offense rests on the assertion that "the same evidence" was used to convict him on both counts. Petitioner's contention is clearly meritless.

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[6]The court of appeals also properly rejected (Pet. App. A5-A6) petitioner's argument that Fed. R. Crim. P. 43(a), which requires the defendant's presence "at every stage of the trial," was violated by the jury view in the instant case. As this Court noted in *Synder*, 291 U.S. at 113, "a [jury] view is not a 'trial' nor any part of a trial * * *." In any event, under Fed. R. Crim. P. 43(b), a defendant may voluntarily absent himself from a part of the trial; in this case, petitioner forfeited whatever right he might have had by not requesting to be present at the viewing and, in fact, agreeing to the procedure followed. Finally, because there was no prejudice, any error was harmless.

As this Court stated in *Albernaz* v. *United States*, 450 U.S. 333, 344 (1981) (citations and footnote omitted):

> "[W]here consecutive sentences are imposed at a single criminal trial, the role of the constitutional guarantee [against double jeopardy] is limited to assuring that the court does not exceed its legislative authorization by imposing multiple punishments for the same offense." Thus, the question of what punishments are constitutionally permissible is not different from the question of what punishments the Legislative Branch intended to be imposed. Where Congress intended * * * to impose multiple punishments, imposition of such sentences does not violate the Constitution.

See also *Missouri* v. *Hunter*, No. 81-1214 (Jan. 19, 1983).

The substantive and conspiracy statutes under which petitioner was convicted (21 U.S.C. 841 and 846) plainly satisfy the test of *Blockburger* v. *United States*, 284 U.S. 299, 304 (1932), since each "requires proof of a fact which the other does not." See *United States* v. *DeVincent*, 632 F.2d 155, 159-160 (1st Cir. 1980), cert. denied, 450 U.S. 984 (1981) (aiding and abetting a substantive offense and conspiracy to commit that offense are distinct crimes under the *Blockburger* test); *United States* v. *Bright*, 630 F.2d 804, 813 (5th Cir. 1980) (same); *United States* v. *Kearney*, 560 F.2d 1358, 1365-1367 (9th Cir.), cert. denied, 434 U.S. 971 (1977) (same); see generally *Pinkerton* v. *United States*, 328 U.S. 640, 642-643 (1946).[7] Moreover, the two provisions were enacted as part of the Comprehensive Drug Abuse Prevention and Control Act of 1970, and there is

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[7]Petitioner's suggestion (Pet. 31) that this Court's decisions in *Whalen* v. *United States*, 445 U.S. 684 (1980), and *Illinois* v. *Vitale*, 447 U.S. 410 (1980), require a "re-examination" of the *Blockburger* test is baseless since the Court recently reaffirmed that test in *Albernaz*, 450 U.S. at 337-338, 344-345 n.3.

"nothing in either the Act or the legislative history which would indicate that Congress intended to depart from the general rule that courts can impose separate sentences for the conspiracy to commit an offense and the accomplishment of the substantive offense itself." *United States* v. *Wylie*, 625 F.2d 1371, 1381 (9th Cir. 1980), cert. denied, 449 U.S. 1080 (1981). In fact, "[t]he structure and legislative history of the drug abuse act provide persuasive evidence that, because of the special dangers which conspiracies to distribute controlled drugs pose to society, Congress did intend that a conspiracy to violate the Act should constitute a separate crime in addition to the substantive offense." *Wylie*, 625 F.2d at 1382 (quoting *United States* v. *Bommarito*, 524 F.2d 140, 143-144 (2d Cir. 1975)). See also *Albernaz*, 450 U.S. at 343; *United States* v. *McDonald*, 692 F.2d 376, 380 (5th Cir. 1982), cert. denied, No. 82-6279 (Apr. 4, 1983) ("one stated goal of the 1970 Act was to bring the full power of the federal government to bear on the illegal traffic in drugs").[8]

Contrary to petitioner's contention, no different result is required by the fact that the same evidence was used to prove the substantive and conspiracy drug offenses. As this Court has made clear, the governing standard "focuses on the statutory elements of the offense. If each requires proof of a fact that the other does not, the *Blockburger* test is satisfied, notwithstanding a substantial overlap in the proof offered to establish the crimes." *Albernaz*, 450 U.S. at 338 (quoting *Iannelli* v. *United States*, 420 U.S. 770, 785 n.17

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[8]The fact that petitioner's substantive conviction rested upon an aiding and abetting theory (18 U.S.C. 2) does not lead to a different conclusion, as he claims (Pet. 31). The aiding and abetting statute does not state a new offense, but merely provides that an accomplice to an offense "is punishable as a principal." Thus, petitioner is in no different position than if he had personally rather than vicariously committed the substantive offense.

(1975)). And petitioner has pointed to no reason to believe that Congress did not "intend to allow the courts to impose consecutive sentences for consipracy (21 U.S.C. § 846), and for substantive offenses (21 U.S.C. § 841(a)(1)), even when the proof necessary to obtain a conviction for the former was necessary to obtain a conviction for the latter offense." *Wylie*, 625 F.2d at 1382 (footnote omitted). Accordingly, the court below correctly held (Pet. App. A8) that the imposition of consecutive sentences in this case did not violate the Double Jeopardy Clause. See *United States* v. *Wylie, supra*; *United States* v. *Pearson*, 655 F.2d 569, 570 (1981), aff'd on rehearing, 667 F.2d 12, 15 (5th Cir. 1982).[9]

3. Petitioner contends (Pet. 28-30) that his rights under the Due Process Clause and Fed. R. Crim. P. 32 were violated by the government's filing of a pre-sentence memorandum. This contention is without merit.

The pertinent facts, as set forth in the opinion below (Pet. App. A8-A9 & n.5), show that prior to petitioner's sentencing, the government filed a pre-sentence memorandum that contained "hearsay material and matters involved in [petitioner's] upcoming trial on laundering charges." The district court granted petitioner's motion to strike the portions of the memorandum dealing with the laundering allegations, but it denied his request for a new pre-sentence

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[9]There is no merit to petitioner's contention (Pet. 31) that the decision below conflicts with *Pandelli* v. *United States*, 635 F.2d 533 (6th Cir. 1980), and *United States* v. *Austin*, 529 F.2d 559 (6th Cir. 1976). Those cases — which antedated *Albernaz* and *Hunter* — did not involve the Drug Control Act, and the offenses for which multiple punishments were imposed were found to charge essentially the same crime and not to reflect a congressional purpose to authorize multiple punishment. In the instant case, by contrast, the statutes under which petitioner received consecutive sentences meet the *Blockburger* test for separate offenses, and the evidence of congressional intent in the Drug Abuse Act does not cast doubt upon the propriety of consecutive sentences.

investigation and for sentencing before another judge. A sentencing hearing was held at which both parties were permitted to call and cross-examine witnesses; in addition, petitioner was allowed to give an unsworn statement that was not subject to cross-examination (*id.* at A9). Finally, at the time of petitioner's sentencing, the district judge stated that he had not considered the government's memorandum (*id.* at A9, A10-A11).

It is a " 'fundamental sentencing principle' that 'a judge may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come.' " *Roberts* v. *United States*, 445 U.S. 552, 556 (1980) (quoting *United States* v. *Grayson*, 438 U.S. 41, 50 (1978), and *United States* v. *Tucker*, 404 U.S. 443, 446 (1972)). See also 18 U.S.C. 3577; 21 U.S.C. 850. "At a sentencing, a Court can consider many matters that might not be admissable at a trial * * *" (*United States* v. *Bowdach*, 561 F.2d 1160, 1175 (5th Cir. 1977)), and the sentencing court's broad discretion will not be disturbed "absent gross abuse." *United States* v. *Gonzalez*, 661 F.2d 488, 495 (5th Cir. 1981).

Under these principles, the court of appeals correctly rejected (Pet. App. A10-A11) petitioner's claim. Since petitioner was given a full sentencing hearing and had ample opportunity to rebut the materials submitted by the government, there was "no abuse of discretion by the trial court in the sentencing of [petitioner] and no violation of [his] rights" (*id.* at A10). And in any event, the record makes clear, as the court of appeals pointed out, that the district court did not consider the challenged pre-sentence report in imposing sentence on petitioner (*id.* at A9, A10-A11).

4. Finally, petitioner argues (Pet. 22-27) that the court below improperly "adopted" the evidence presented at co-defendant Espinosa's separate trial in rejecting petitioner's

claim on appeal that the evidence at his trial was insufficient to support his conviction. This argument is predicated on the fact that, at the outset of its opinion in this case, the court of appeals noted that "[t]he facts surrounding [petitioner's] arrest are set out in [the opinion affirming Espinosa's conviction]" (Pet. App. A2).

The introductory reference to the background description in the *Espinosa* opinion plainly does not suggest that the court of appeals judged the sufficiency of the evidence presented at petitioner's trial on the basis of the record in *Espinosa*. On the contrary, the facts recounted by the court below in rejecting petitioner's insufficiency argument (Pet. App. A6-A7) had been established by evidence adduced at petitioner's own trial. See, *e.g.*, Tr. 28, 31-43, 145-152, 218-225; see also pages 2-3, *supra*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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